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No. 08-

IN THE

Supreme Court of the United States

DONN RAYMOND CAMPION,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

JOHN DERRICK
Counsel of Record
THE LAW OFFICE OF JOHN DERRICK
21 East Pedregosa Street
Santa Barbara, CA 93101
(805) 284 1660

Counsel for Petitioner

217583

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

1. In a trial to set just compensation for a taking by the United States involving an easement for high-voltage power transmission lines across what was previously developable land — in which the landowner claims severance damages and in which both sides agree that public fear of electromagnetic fields (EMFs) is at issue — should a landowner be allowed to introduce expert testimony as to: (a) the amount of his or her surrounding land that is burdened by EMFs generated by the power transmission lines; (b) the EMF measurements on different portions of that surrounding land; and (c) the types of studies that developers and others commission about the presence and extent of EMFs on land they are considering buying?

2. Under the facts of this case, did the district court err in excluding such evidence?

THE PARTIES

The real parties in interest in this eminent domain matter are the United States of America and Donn Raymond Campion, the owner of land that was taken and of surrounding land. As is common in such matters, the taken land — "87.98 Acres of Land More or Less in the County of Merced" — is itself listed on the caption as a nominal defendant.

The California Department of Fish & Game and an official named Karen Adams were also listed on the caption in the proceedings below as defendants, but they were not parties in the trial leading to the judgment that was appealed and they can be disregarded in the analysis of the case.

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OPINION BELOW

The United States Court of Appeals for the Ninth Circuit published its opinion in this matter, which can be found at 530 F.3d 899 (9th Cir. 2008). The decisions of the United States District Court for the Eastern District of California giving rise to the judgment that was appealed were not published.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). The United States Court of Appeals for the Ninth Circuit filed its opinion in this matter on June 24, 2008. (Appendix ("App.") 2a.) The basis of the Ninth Circuit's jurisdiction was that this was an appeal of a final judgment of the United States District Court for the Eastern District of California. 28 U.S.C. § 1291. This petition was filed within 90 days of issuance of the Ninth Circuit's opinion. Rule 13.1.

CONSTITUTIONAL PROVISION INVOLVED

This case involves the application of a portion of the Fifth Amendment to the United States Constitution: "nor shall private property be taken for public use, without just compensation."

STATEMENT OF THE CASE

1. The United States took land belonging to Donn Campion to acquire an easement for extra-high-voltage power transmission lines

This petition arises out of an eminent domain action, in which land was taken by the United States. The land forms part of a property known as Agua Fria, located in Merced County, California. That property consists of 3,220 acres. It is owned by petitioner Donn Campion. At the time of the taking, Campion was well advanced in a project to develop the land by obtaining permits for a roughly 2,200-home development to be called Agua Fria Village.

The purpose for which the land was taken was to locate an extra-high-voltage, overhead power transmission line. This was at the behest of the Western Area Power Administration ("WAPA"), an agency of the federal government. The power transmission line is known as "Path 15." At the time of trial, Path 15 had already been constructed on Campion's land. The purpose of the trial was not to determine whether the taking was justified, but to set just compensation.

The fold-out photograph at the back of the appendix — part of trial exhibit 11 — illustrates the sheer enormity of these towers by showing a van parked next to one of them. The van appears diminutive by comparison.

Path 15 is one of the biggest power transmission lines in California. It moves electricity from the Canadian border into Southern California. The line carries 500,000 volts. That is massively more than the local distribution lines that go through residential neighborhoods delivering electricity into people's homes. The WAPA project manager testified that the lines on Campion's property emit a "buzzing" or "crackling" sound at times, depending on their load and the weather. He further confirmed that they emit electromagnetic fields ("EMFs").

The taking involved a 200-foot easement running for approximately three miles. The easement covers 87.98 acres. Along the easement are 13 steel towers, averaging about 150 feet in height. Each of these supports 13 uninsulated, extra-high-voltage lines. The heights of the towers range from about 130-190 feet. The towers branch out for a total of 80 feet (40 feet on each side). The line of towers goes right through the center of what was to have been Agua Fria Village. This is illustrated by the fold-out plan at the back of the appendix, which was a trial exhibit. The red line shows the final positioning of Path 15 superimposed on the planned development as it had been drawn up in 1993.

2. Campion and the Government differed on the highest and best use of the land before and after the taking

The Government's appraiser considered that the highest and best use of the land before the taking was for agricultural purposes, notwithstanding Campion's 13 years of entitlement efforts that were nearing

completion. On that basis, the Government appraiser valued the entire Agua Fria property — all 3,220 acres — at $3.075 million in the "before condition." He also opined that the taking involved no damage to the value of the remainder of the land. In other words, his opinion was that compensation was due only for the actual area covered by the easement. On that basis, he testified that the compensation due amounted to a mere $76,518.

The Government's main argument was that the land was not suitable for residential development to begin with. However, it also contended that even if the land were suitable for this purpose before the taking, it would have continued to be so afterwards. Its view was that these enormous towers — with their uninsulated, extra-high-voltage, crackling lines — did not make the slightest difference.

By contrast, Campion's appraiser valued the land in the "before condition" on the basis that its highest and best use was for residential development. He testified that the 3,220 acres in the "before condition" was worth $19.320 million.

Campion's appraiser also concluded that the power transmission lines diminished the value of the remainder of the land — in other words, that the damage was not limited to the easement alone. Citing public perceptions of power lines and the health risks associated with the EMFs, environmental issues limiting development in other areas of the property, and the practicalities of developing with power lines going through the heart of what was previously developable, he concluded that the highest and best use of the entire property in the "after condition" was for grazing purposes.

Based on this, Campion's appraiser valued the entire property after the taking at $3.22 million. Deducting the "after" value from the "before" number, Campion concluded that the total compensation due was $16.1 million. Of this, the portion attributed to the easement alone was $1.415 million.

3. Campion sought to introduce testimony about how the presence of electromagnetic fields caused by the extra-high-voltage transmission lines would affect the land value

The opinion of Campion's appraiser about the "after" valuation was influenced by the report of another of Campion's experts, Cindy Sage. This expert was an environmental planner with over 30 years' experience. She had extensive experience on how elevated levels of EMFs, combined with public perceptions of EMFs, impact the use and development of real property.

Sage's proposed testimony was summarized in Campion's offer of proof filed shortly before trial. It included the following:

- *Public perceptions:* Sage planned to testify that there is a negative perception about EMFs among residential homeowners and buyers, as well as among developers of residential projects. As shown below, that is the one significant area where her testimony was allowed.

- *Work that Sage carries out for developers and others with concerns about EMF levels on property:* Sage also proposed to testify about the types of studies relating to EMFs for which property developers engage her in connection with particular projects. The offer of proof stated that "[s]he is routinely called upon to measure EMF or perform EMF computer modeling to determine the exposure levels of EMF." This would have informed the jury about the types of inquiries that prudent buyers make in order to become knowledgeable. This was essential to Campion's case, because, as shown later in this argument, compensation is awarded by valuing land from the perspective of such a buyer.

- *The distance that EMFs from the Path 15 lines extend onto Campion's land surrounding the easement:* A key area of Sage's proposed testimony concerned actual EMF levels on Campion's land adjoining the easement. This would have included charts showing how, under different loading conditions, the EMFs extend beyond the easement boundaries. For example, one map prepared by Sage showed that under a 2,505-amp loading condition, the EMFs extend 850 feet from the edge of the easement. Another showed that under 4,660-amp loading, they spread 1,185 feet from the edge.

> Campion asked that these maps be offered "for the limited purpose of illustrating the undisputed fact that the Path 15 Project has resulted in putting EMF on the remainder property, which had no EMF in the before condition."

- *The degree of EMF intrusion onto Campion's surrounding land measured by the quantity at different distances:* Likewise, Sage would have testified as to how the intensity of EMFs varies according to the distance from the easement boundary. This would have included testifying about the environmental analysis completed for the Path 15 project.

Sage would not have testified as to whether EMFs actually are dangerous. Nor did Campion seek to introduce evidence on that subject from another expert.

4. The district court allowed limited testimony about public perceptions of EMFs, but excluded almost all the rest of the testimony relating to EMFs

The Government sought, through a motion in limine, to exclude Sage's entire testimony. The district court never issued a written order dealing with this motion. Rather, during a succession of hearings before and during trial, and after a succession of papers were filed

arguing both sides, the court ruled as follows (although not in a single ruling):

- Sage was permitted to testify in general terms that there is a negative public perception about the safety of EMFs. Although the Government wanted to keep this out, it did not dispute the fact that this perception does exist. Indeed, it stated that it was willing to *stipulate* to that fact in lieu of her testimony.

- Sage was allowed to reference a list of clients for whom she has done work relating to EMFs and to talk "briefly" about her experience in order to establish her credentials, but she was prevented from testifying as to the specific nature of the work.

- In particular, Sage was barred from testifying that she is routinely called upon to measure EMF levels or to perform a test using a computer model to determine them.

- Sage was barred from testifying as to specific projects on which she had consulted with regard to the impact of EMFs on development.

- Finally, Sage was barred from testifying as to the presence of EMFs in various parts of Campion's land, and the actual

> EMF levels, in the "after condition." This meant, as well, that various exhibits in the form of charts designed to illustrate her testimony were kept out.

As a result of these rulings, Sage's testimony relating to EMFs was cut short to the point of being eviscerated.

5. Critical portions of the planned testimony by Campion's appraiser relating to EMFs were also barred

Campion's appraiser relied, in part, on Sage's opinions. As a consequence, portions of his testimony were also barred.

He was barred from testifying that the size of the power transmission line — and the amount of electricity it carried — would impact the issue of whether the surrounding land could be developed. And he was barred from relying on any part of Sage's proposed testimony to the effect that EMF levels required a larger setback than the one provided by the easement. In fact, as the Ninth Circuit's opinion makes clear, he was not even allowed to testify that the presence of EMFs on Campion's property surrounding the easement affected the land value. (App. 4a.)

6. After Campion's appraiser referred briefly to the extent of EMFs on land surrounding the easement, the court issued a limiting instruction

In the course of direct examination, Campion's appraiser testified: "If you're aware of information about EMFs and how far electromagnetic fields extend from power lines, you would take that into consideration. It goes out for hundreds of yards."

The Government objected to this testimony as violating the court's pretrial order and the district court sustained the objection. As a result, it gave a limiting instruction to the jury that consideration of the appraiser's references to EMFs should be limited to public perceptions only — thereby foreclosing consideration of the objective fact as to how far the EMFs actually spread beyond the easement onto Campion's property.

Earlier, the WAPA project manager did acknowledge in front of the jury that EMFs from the Path 15 lines extend beyond the boundaries of the easement. However, he did not testify as to how far or in what degree. *The jury was left to wonder whether the intrusions measured mere inches or hundreds or thousands of yards.*

7. The jury plainly found that the highest and best use of Campion's land in the "before condition" was for residential development

At the conclusion of trial, the jury found that the value of the entire 3,220 acres in the "before condition" was $14.892 million. Although the verdict form did not expressly ask about the highest and best use before the taking, the jury's decision can only mean that it agreed with Campion that the land was suitable for residential development. While the jury's valuation was not as high as Campion's — $14.892 million as opposed to $19.320 million — it was far in excess of the Government's agricultural-based valuation of $3.075 million.

8. The jury found that the taking caused only modest diminution in the value of Campion's land surrounding the easement

The Government and Campion appraisals were quite close with respect to the "after condition." As indicated earlier, the Government found that the entire property after the taking was worth $2.998 million (calculated by subtracting the compensation the Government claimed was due from its valuation of the entire property before the taking). This compares with Campion's appraisal of the entire property after the taking of $3.22 million. Thus, the difference was $222,000.

The reason why the Government and Campion were close to agreement on the "after condition" valuation is that both considered, at that point, the highest and best use to be for grazing or similar agriculture. The difference was in their views as to how this had come

about. The Government maintained that this had been the highest and best use all along. Campion, by contrast, maintained that the taking had caused the highest and best use to diminish from residential development to agriculture.

Despite the parties' general agreement as to the "after value," the jury reached a conclusion on this point that neither side supported. It found that the "after value" of the entire 3,220 acres was $12.868 million. Subtracting its "before" and "after" valuations, the jury determined just compensation to be $2.023 million.

The only logical inference is that the jury, while agreeing with Campion that the land was developable before the taking, disagreed with him — and the Government — that it was not developable afterwards. However, the jury did find that there was some diminution in the value of the land surrounding the easement. This is because, on Campion's own valuations, the compensation due for the easement area alone was $1.415 million. The fact that the jury set compensation of $2.023 million — i.e., more than the amount Campion claimed for the easement portion alone — can only mean it found some injury to the value of the non-easement portion of the land.

REASONS FOR GRANTING THE PETITION

A. THIS CASE PRESENTS AN ISSUE OF GREAT PUBLIC INTEREST ON WHICH THERE IS AN INCONSISTENT BODY OF LAW

> "During the past decade, the uncertainty about possible health risks associated with exposure to electromagnetic fields (EMFs) has prompted increased concern by the scientific community, public interest groups, and people who live near facilities that emit EMFs. Although a number of epidemiological studies have been conducted during the past twenty years, there is no scientific data that *conclusively* links EMF exposure with adverse health effects, including certain forms of cancer."

47 Am. Jur. Proof of Facts 3d 473 (2008) (citations omitted, emphasis in original).

"Research on EMF continues to be a highly controversial topic because of the enormous public exposure, inconclusive laboratory results, and the public's perception of cancer risk. Fueled by media reports on the conflicting results of various studies, public fear of exposure to EMFs has intensified during the past decade." 47 Am. Jur. Proof of Facts 3d 473 (2008) (citations omitted).

This case provides the Court with an opportunity to review the issue of how the presence of EMFs impacts the award of just compensation when the Government

takes land for power transmission lines or other similar purposes. As shown in this petition, the Ninth Circuit's decision in the present case has created an inconsistent body of law on this important issue. It is in tension with more general rules about how landowners should be compensated when a taking results in a perception of a hazard that impacts the value of surrounding land.

B. IT MAKES NO SENSE TO TELL A JURY THAT IT CAN TAKE ACCOUNT OF PUBLIC PERCEPTIONS OF EMFs IN VALUING LAND BUT THEN TO WITHHOLD UNCONTESTED INFORMATION ABOUT HOW MUCH OF THAT LAND IS BURDENED BY EMFs AND TO WHAT EXTENT

The text of the Fifth Amendment to the United States Constitution confirms the state's authority to confiscate private property, but imposes two conditions on its exercise: the taking must be for a public use, and just compensation must be paid. *Brown v. Legal Foundation of Washington*, 538 U.S. 216, 376 (2003). Here, Campion acknowledges that the taking of his property was for a public use. The issue is whether the district court's rulings deprived him of his constitutional right to just compensation.

The compensation at issue falls under the category of "severance damages." These apply when a portion of a tract of land is taken under the power of eminent domain and the owner is entitled to compensation for the diminution of the value of the remainder resulting from the taking. *United States v. Miller*, 317 U.S. 369, 376 (1943). Here, Campion sought severance damages

for the diminution in the value of his land surrounding the easement caused by the negative public perception of EMFs emanating from the giant power transmission lines.

The starting point in the analysis is that it was a given — accepted by both sides in this case and by the district court — that there *is* a public perception that EMFs have a detrimental affect on health and that this *was* a relevant factor in valuing Campion's land. The existence of that public perception was acknowledged by the Ninth Circuit in its opinion. (App. 3a.)

Logically, therefore, it is surely also a given that the presence — or absence — of EMFs on developable land surrounding power transmission lines is going to affect land value. The logic is undeniable: Given a choice between otherwise identical land that is and is not burdened by EMFs, a rational and informed buyer would, price being equal, always choose the land that is not burdened. A rational and informed buyer would choose burdened land — if at all — *only* if the price reflected the detriment. Conversely, if it were known that land is not burdened by EMFs, then perceptions about the dangers of EMFs become irrelevant.

The issue, then, is whether, if the jury was told that public perceptions of EMFs are relevant to its valuation, it should also have been allowed to hear evidence about the extent to which Campion's land was burdened by EMFs. This extent can be measured in two ways: (1) The distance over which EMFs extend onto the land; and (b) the amount of EMFs that are present. A related issue is whether the jury should also have been allowed

to hear testimony about the types of inquiries that buyers of this type of land typically make about the presence of EMFs and the types of information they receive in response. (Those buyers, typically, would be developers or "merchant builders," not individual homeowners.)

The error in this case — *resulting in a huge injustice* — was that such evidence was kept from the jury. This was despite the fact that — as shown below — *there was no disagreement as to the reliability or validity of the measurements that Campion sought to introduce.*

The Ninth Circuit stated in its opinion that the jury did hear evidence that Campion's land was burdened. (App. 8a.) This was part of its reasoning that there was no error or that any error was harmless.

However, what the jury heard was wholly inadequate. As noted in the Statement of the Case, the WAPA project manager let slip in his testimony that the EMFs from the Path 15 lines spread beyond the easement area — *but without stating by how far or by how much.* The fact that the jury did hear this limited evidence about intrusions of EMFs beyond the easement did not render the exclusion of Sage's testimony harmless. This is because the WAPA testimony provided no information beyond the bare minimum that there was some intrusion. Based on the WAPA testimony alone, the jury did not know whether the intrusion measured mere inches or hundreds or thousands of yards. It needed to hear Sage's testimony to find out the extent.

To the jurors, it must have seemed as though Campion were presenting a rather weak case — talking about perceptions, but not giving them any hard facts to substantiate his claim that those perceptions would cause substantial damage to the value of his particular land. *Deprived of evidence as to this crucial factor — but not believing the Government's testimony that the land was not developable anyway — the jury awarded only minimal severance damages.*

Furthermore, the jury was instructed not to consider the little that leaked out on this subject. As the Ninth Circuit opinion acknowledges, when Campion's appraiser remarked that the EMFs extended several hundred yards beyond the easement, the jury was given a limiting instruction that his testimony about EMFs could only be considered on the subject of public perception — thereby foreclosing the possibility that it would also consider the testimony as proof of the *presence* of EMFs over that area. (App. 8a, fn 2.) See *United States v. Escalante*, 637 F.2d 1197, 1202 (9th Cir. 1980) [it is presumed that juries will follow a district court's limiting instructions].

The rule advocated by Campion — that a party should have the right to introduce evidence about the presence of EMFs — would not necessarily work to the benefit of landowners and to the detriment of the Government. It could work the other way, too. If it were proper to allow evidence of public perceptions of EMFs, but to disallow evidence as to the actual presence of EMFs, an invitation would be extended to specious claims for severance damages. A landowner could claim that a property located two miles from power lines was

diminished in value because of the public perception of the harmful effects of EMFs. Such a claim would be specious, because there is no scientific evidence that EMFs can travel that far. However, the fact that it was specious would be impossible to challenge, because evidence of the actual presence of EMFs would be disallowed.

So the rule adopted by the Ninth Circuit could as often lead to injustice to the Government as to the landowner. Conversely, that adopted by Campion would not always benefit a landowner. What it would do is to place the jury in the shoes of a fully informed buyer.

C. THE PUBLIC POLICY IMPORTANCE OF THIS ISSUE IS HEIGHTENED BECAUSE OF SCIENTIFIC EVIDENCE THAT EMFs ARE HARMFUL

Campion's argument does not rely on the public perceptions being valid. He has acknowledged throughout the litigation that there is no scientific proof as to the health effect of EMFs that is sufficient to meet the standards laid down by this Court in *Daubert v. Merrell Dow Pharmaceutical, Inc.*, 509 U.S. 579 (1993) and its progeny. He has not sought to put the health effects of EMFs on trial.

However, the Ninth Circuit appeared to marginalize the public importance of this issue when it wrote in its opinion that there is "no scientific evidence that EMFs from power lines like the Path 15 line cause adverse health effects in nearby residents." (App. 3a.) That statement is incorrect, as it confuses "evidence" with "proof."

It may be true that there is no scientific "proof" about the health effects of EMFs. However, to say that there is no "evidence" of ill effects is simply wrong. As one scholar noted more than a decade ago: "Even though there is no conclusive evidence that electromagnetic fields are cancer-causing, particularly at the low levels emitted by cellular phone transmitters, there is also no conclusive evidence that they are not. *In fact, many studies have found a correlation between exposure to electromagnetic fields and cancer.*" 12 Berkeley Tech. L.J. 483, 486 (1997), Susan Lorde Martin (emphasis added).

A prominent legal treatise has chronicled how "[c]oncern about potential health risks of exposure to EMFs date[s] back at least three decades." (47 Am. Jur. Proof of Facts 3d 473, § 3.) It explains: "The first studies, conducted in the Soviet Union 30 years ago, suggested a link between exposure to electric fields and certain chronic afflictions such as headaches, fatigue and nausea. . . . Then, in 1979, an EMF scare was triggered by the results of a major epidemiological study on EMFs conducted in the Denver area which suggested a correlation between childhood leukemia and exposure to power lines." *Id.* (citations omitted).

Public concerns over EMF exposure were heightened with a 1990 U.S. Environmental Protection Agency draft report circulated for external review. (47 Am. Jur. Proof of Facts 3d 473, § 3.) That report concluded: "[S]everal studies showing leukemia, lymphoma and cancer of the nervous system in children exposed to magnetic fields from residential 60-Hz electrical power distribution systems, supported by

similar studies also involving electrical power frequency exposures, show a consistent pattern of response which suggests a causal link." (*Id.*, citing to *U.S. EPA, Evaluation of the Potential Carcinogenity of Electromagnetic Fields, EPA/600/6-90/005B, at 1–7 (Oct. 1990).*)

This treatise's analysis — supported by numerous citations to scientific papers — continues: "Some epidemiological studies suggest that EMF exposure may correlate with certain forms of cancer. In addition, several "in vitro" studies indicate that even very weak low frequency EMF exposure, under some circumstances, can produce substantial cellular changes in biological tissue. Some of the effects reported in laboratory studies include altered functions of cells and tissues, decreased levels in the hormone melatonin, alterations in the immune system, accelerated tumor growth, changes in biosynthesis, and changes in human brain activity and heart rate." (47 Am. Jur. Proof of Facts 3d 473, § 3.)

So to state — as the Ninth Circuit did — that there is "no evidence" of adverse health effects is to ignore reality. One is reminded of how for years the health effects of tobacco were marginalized because of the absence of definitive "proof." See, e.g., *Insolia v. Philip Morris, Inc.*, 216 F.3d 596, 598 (7th Cir. 2000).

The evidence about the health effect of EMFs has had an effect on public policy. For example, California law imposes a minimum setback of 350 additional feet beyond each side of the easement for schools located near to power lines such as those at issue. Cal. Admin.

Code Tit. 5, § 14010. Applying that standard to the present case would result in a 900-foot corridor instead of the 200-foot easement taken by WAPA.

Campion's argument does not depend on the existence of this evidence, nor does he contend that this evidence should have been placed before the jury. However, the existence of this evidence elevates the importance of this whole issue from a public policy perspective. And that is a compelling reason why this case deserves the attention of this Court. Furthermore, the existence of this evidence in the public domain makes it all the more likely that buyers of land adjoining extra-high-voltage power transmission lines will make inquiries about EMF levels — which was one of the subjects on which Sage was barred from testifying.

D. THE DECISION IN THIS CASE SETS UP A RULE OF LAW FOR EMF CASES THAT DIFFERS FROM THAT WHICH OTHERWISE APPLIES IN EMINENT DOMAIN LAW

This Court long ago held that when determining value in a condemnation case, "there should be taken into account *all* considerations that fairly might be brought forward and given substantial weight in bargaining." *Olson v. United States*, 292 U.S. 246, 257 (1934) (emphasis added). Consistent with that rule, the jury in the present case was instructed that "fair market value" "means the amount a willing buyer would have paid a willing seller in an arm's-length transaction with both parties being *fully informed* concerning *all* of the advantages and disadvantages of the property, and with neither acting under any compulsion to buy or sell." (Emphasis added.)

There was nothing wrong with that instruction. It properly asked the jurors to step into the shoes of a fully informed buyer. What was wrong was that the jury was deprived of the evidence necessary to carry out the instruction. Without that information, the jury was not able to determine what a willing buyer would have paid if "fully informed concerning all of the advantages and disadvantages of the property." *The jury ended up having to value the land in the "after condition" knowing much less than the informed buyer in whose shoes it was supposed to stand.*

The exclusion of this evidence is in tension with previously settled law that diminution in value that is the result of a fear of a perceived hazard *is* compensable as part of severance damages. See, e.g., *United States v. 14.38 Acres of Land, More or Less Situated in Leflore County, State of Miss.*, 80 F.3d 1074, 1079 (5th Cir. 1996). Indeed, that has also been the rule in the Ninth Circuit. See, e.g., *United States v. 760.807 Acres of Land*, 731 F.2d 1443, 1447 (9th Cir. 1984).

Moreover, the rule across many jurisdictions — federal and state — is that diminution in value caused by fear may be recoverable *regardless* of whether the fears are justified. See, e.g., *United States ex rel. TVA v. Easement and Right of Way*, 405 F.2d 305, 309 (6th Cir. 1968)

> ["In the final analysis, we are concerned only with market value. Although these studies may show objectively the complete safety of these structures, we are not convinced that certain segments of the buying public may not

> remain apprehensive of these high voltage lines, and therefore might be unwilling to pay as much for the [adjacent] property as they otherwise would."];

United States v. 2,877.37 Acres of Land in Harris County, Tex., 52 F.Supp. 696, 702 (S.D.Tex. 1943) [testimony to show severance damages based on "mental hazards" arising from fear of harm from dams or levees built by government properly admitted]; *Florida Power & Light Co. v. Jennings*, 518 So.2d 895, 898 (Fla. 1987) ["[w]e join the majority of jurisdictions who have considered this issue and hold that the impact of public fear on the market value of property is admissible without independent proof of the reasonableness of the fear."]; *Ryan v. Kansas Power & Light Co.*, 249 Kan. 1, 815 P.2d 528, 533 (1991) [evidence of fear in marketplace admissible regarding value of property without proof of reasonableness of fear]; *City of Santa Fe v. Komis*, 114 N.M. 659, 845 P.2d 753, 756 (1992) [same]; *Criscuola v. Power Authority of the State of New York*, 81 N.Y.2d 649, 602 N.Y.S.2d 588, 589, 621 N.E.2d 1195, 1196 (N.Y. 1993) [same].

However, to keep from the jury the information necessary to decide whether the fear would exist — i.e., the actual presence of the alleged danger — is to render this rule toothless. The rule that was applied in the present case appears to be that a jury cannot be told about the actual presence of a condition that may be perceived to be a danger if that danger has not been scientifically proven to *Daubert* standards.

The consequences of that rule are shown in the following hypothetical: Assume that a jury has the task of valuing an apartment in a multi-story building, which happens to be on the 13th floor; and assume further that the jury is told that there is a public perception that the number "13" is unlucky, such that, all other things being equal, buyers would tend to avoid an apartment on the 13th floor if a similar one, priced the same, were available on the 12th or 14th. It would make no sense to, on the one hand, tell jurors that there is a public perception weighing against 13th-floor apartments, while at the same time *not* telling the jury that the apartment at issue *is* on the 13th floor.

Yet that is precisely what happened in the present case. The jury was told that there is a public perception that EMFs can cause harm to people who live on land that is burdened by them. But the jury was not allowed to hear evidence about how much of the land surrounding the Government's easement *is* burdened by EMFs spilling over. (Of course, in this case, there is considerably more evidence about the safety effects of EMFs than about the lack of luck associated with the number 13. Nonetheless, the hypothetical makes the point.)

E. SINCE THE DISTRICT COURT'S EXCLUSIONS OF EVIDENCE WERE BASED ON INCORRECT LEGAL STANDARDS, THEY SHOULD BE REVERSED EVEN IF REVIEWED FOR ABUSE OF DISCRETION

The authority cited above shows that the district court departed from established legal principles when, in effect, it ruled that the jury should decide the value of Campion's land without the benefit of all facts that would influence a knowledgeable person of ordinary prudence. Because the district court's decision departed from settled law, it should be reversed even if reviewed for abuse of discretion. *Koon v. United States*, 518 U.S. 81, 100 (1996) ["district court by definition abuses its discretion when it makes an error of law"].

Consistency is needed in the law. There would be no appearance of justice if, as these long-distance, extra-high-voltage power transmission lines are built — crossing many districts and traversing state boundaries — different levels of compensation end up being paid to different landowners depending on whether this information was put before juries in different districts. The constitutional right to just compensation would be subordinated to the discretion of individual judges.

F. THE DECISION IN THIS CASE IGNORES THE ETHICAL ISSUES THAT IT CREATES

Even if buyers did not make their own inquiries to educate themselves about EMF levels, the landowner in a circumstance like Campion's would be in a precarious ethical position. If the landowner sells the

property, how much information about the presence of EMFs should he or she disclose to prospective buyers? Just the amount of information that was made available to the jury that decided the issue of severance damages? Or the full amount of information that the landowner has? The Government passes this huge liability and ethical dilemma onto the landowner, who must either face losing money by disclosing known facts or must fail to disclose information in order to try to avoid a loss. The Government, meanwhile, washes its hands of the problem and simply gets land "on the cheap."

It is not just the ethical seller who is burdened by the dilemma. It is also the ethical developer who buys the land. Should an ethical developer build homes right next to these extra-high-voltage power transmission lines and encourage people to live in them? Should such a developer do so, even though — under California law — schools could not be located that close? What should the developers disclose?

Again, the Government walks away from this problem. It takes the land and leaves it to others to weigh ethics with economic consequences.

G. THE NINTH CIRCUIT'S DECISION CANNOT BE EXPLAINED AWAY BY POINTING TO ALLEGED DEFICIENCIES IN THE SPECIFIC EVIDENCE IN THIS CASE

Campion expects that the Government will try to offer a narrow reading of the Ninth Circuit's opinion in the present case, arguing that it did not so much set up a per se rule regarding evidence about the presence of

EMFs as address deficiencies in the specific evidence that was offered in this particular instance. By limiting the scope of the holding, the Government will seek to marginalize its importance.

The Government is likely to point to language in the opinion stating that "[b]ecause Sage was not an expert appraiser and there had been no showing that her EMF measurements were reliable, the district judge excluded her testimony except to the extent that [the appraiser] relied upon it in reaching his conclusion." (App. 5a.) If that statement were correct, it might support a narrow reading of the decision. However, the statement is not correct. The Government has never — at any point in this litigation — argued that Sage's EMF measurements were not reliable. It has given every indication of agreeing with them. Rather, the Government's argument was to the effect that evidence about the actual presence of EMFs was somehow a surrogate for inadmissible evidence about actual health effects. According to the Government, Sage's measurements should be left out *even if* reliable and accurate.

As for the fact that Sage was not an appraiser, that is irrelevant. Campion never argued that Sage was to testify in the shoes of an appraiser. The division between Sage, on the one hand, and the appraiser on the other, was as follows:

- Sage, who did testify on public perceptions, would — had she been allowed — also have testified on actual

> EMF presence and on the types of inquiries that buyers routinely make on that subject.
>
> • That would have tied in with the appraiser's testimony, which — if allowed in full — would have included an opinion that known EMF presence beyond an easement boundary impacts buyers' views about developability and, hence, price. The appraiser relied on Sage in this instance, because it was her report that informed him that there was EMF penetration and that buyers made it their business to find out about actual EMF levels.

The Ninth Circuit's opinion also appeared to find there to have been an insufficient nexus between the proposed testimony of Sage and the valuation carried out by the appraiser. Specifically, it wrote: "While public perceptions of danger from power lines are, to some extent, predicated on the *existence* of EMFs in a given area, [the appraiser's] testimony in the record and his report do not suggest that EMF *measurements* are relevant to public perceptions. . . . In the absence of relevant and probative evidence, a jury could only speculate concerning the effect of a particular measurement on public perception. Perhaps the general public, unschooled in the significance of the milligauss, is afraid of actual EMFs in any quantity, so long as they come from a big power line. Or perhaps the levels of EMFs that exist on Campion's land would even *ease* public fears in the marketplace. . . . Without any

evidence from [the appraiser] or anyone else that higher levels of EMF generate higher levels of buyer aversion and lower sale prices, Sage's testimony about specific EMF levels has little to no probative value." (App. 11a-12a, emphasis in original, footnote omitted.)

That reasoning does not justify the wholesale exclusions of Sage's testimony. First, there was no need for the appraiser to have come up with a formula that shows the specific dollar effect of a particular milligauss[1] reading. This was because his opinion was that — in part because of the EMF levels — the land was no longer developable *at all*. Its highest and best use was for agricultural purposes. So it was not a matter of him testifying how much less it would have sold for as "developable" land. His opinion was that it would not be sold for that purpose at all.

Second, the Government acknowledged in the district court that the appraiser's findings *were* based on Sage's measurements, so both sides accepted that there was a nexus between the measurements and the appraisal. The acknowledgment was made in the following colloquy during in-limine proceedings:

> CAMPION LAWYER: The early EMF maps that Miss Sage prepared showing EMF extending outside of the right of way were maps

[1] One thousandth of a gauss; the unit Sage employed in her measurements.

> [the appraiser] relied on in determining why — that being one of the factors that led him to his conclusion that you couldn't develop this property for a planned residential in the after condition.
>
> GOVT. LAWYER: That's what we've been so concerned on behalf of the plaintiff, Your Honor, is that the — [the appraiser] used Miss Sage's EMF setback to render his opinion that the whole thing is basically rendered virtually worthless.

Third, Sage's measurements sought to show *two* things about the presence of EMFs. One was the *area* of Campion's land that was burdened by EMFs in any quantity. The other was the *amount* of EMFs at different distance points from the power lines. Despite that, the Ninth Circuit wrote: "Campion challenges only the exclusion of more detailed information about the specific levels of EMFs on the land." (App. 8a.) That was not so. He *also* challenged the exclusion of evidence showing how far into his land EMFs — in any quantity — extended.

So among the flaws in the Ninth Circuit's decision is that it failed to separate the two types of measurements — area and amount — and to acknowledge that even if the "amount" measurement were excluded, that would not in itself be a reason for automatically excluding the "area" one. Even if there was insufficient evidence to correlate different amounts of EMFs with specific reductions in market value, that would not be a reason to exclude the evidence about how much of the area was burdened by EMFs in any degree. As pointed out earlier, without this evidence, the jury had no way of knowing whether the intrusion measured mere inches or hundreds or thousands of yards. If the bulk of Campion's land was not burdened by EMFs, and if this fact would be known to informed buyers through the types of inquiries they make, then the EMF factor would not apply to most of the land. Conversely, if the bulk of the land *was* burdened, then it *would* apply to the bulk of it. Given that a rational, fully informed buyer's assessment of the impact of EMFs is necessarily predicated on the *presence* of EMFs, this information was critical — even if information about actual levels was absent.

In addition, it was not just Sage's measurements that were excluded, it was also her testimony about the types of inquiries that buyers of this type of land — typically, developers and merchant builders — make regarding EMF levels when power transmission lines are in close proximity. The Ninth Circuit found that this testimony would have had little probative value, given that Sage was allowed to testify that she advises developers generally. (App. 15a.) But that overlooks the fact that Sage's testimony to the effect that buyers of

this type of land do routinely seek the type of EMF measurements she wanted to testify about provides the otherwise missing link between those measurements and the affect on market value. It was fundamentally unfair to, on the one hand, say that there was not a sufficient showing of a connection between Sage's measurements and the appraiser's assessment of market value in the "after" condition, while at the same time excluding a critical piece of evidence about the very specific inquiries that buyers make that *provides* such a link.

Furthermore, nothing in the opinion suggests that if Campion had only prepared for trial with additional evidence joining up certain dots, everything would have been allowed in. And the reason is that — quite apart from any alleged deficiencies in the evidence — the Ninth Circuit agreed with the Government that there was an unacceptable risk that Sage's testimony would confuse the jury. (App. 12a, 15a.)

This indicates that the Ninth Circuit agreed with the Government's central argument, which was that Sage's testimony was a backdoor way of putting the health effects of EMFs on trial. But in that case, *no* landowner in an eminent domain case of this type could *ever* present evidence of EMF presence or levels to a jury, because this objection would *always* be there — the objection being that as soon as a landowner presents a jury with the information about the extent of a perceived risk whose validity is unproven, there is a possibility that the jurors will make their decision in part on their belief about whether that perception is valid. So the Ninth Circuit appears to have carved out

an "EMF exception" to the general rule — cited earlier in this argument — that severance damages may be awarded to compensate for loss caused by the presence of a perceived danger, *regardless* of whether that perception is valid. According to the Ninth Circuit's adopted rule, the ability to present such evidence has to be weighed against the risk that the jurors will put the validity of the perceived danger on trial.

Of course, the flaw in the whole "confusion" concern is that, logically, it would not matter *even if* the jurors put EMFs "on trial" and concluded that they are dangerous. This is because the perception that they are dangerous suffices to award severance damages. Once it is conceded that the perception is present — as was the case here — it is really immaterial whether the trier of fact happens to believe that the perception is valid. (In fact, given the agreement on both sides about the existence of the public perception, the *only* confusion that could have impacted the result would have worked to Campion's *disadvantage* — i.e., if the jurors valued the land on the basis of their own opinions about EMFs, as opposed to the existence of a public perception, and concluded that EMFs are *not* dangerous.)

As for any possibility that the testimony could have "confused" or "misled" the jury, this could easily have been addressed with a limiting instruction. The court could have instructed the jury that the health effects of EMFs were not on trial and that Sage's testimony could only be considered in the context of deciding how public perceptions would impact the value of Campion's land. As noted earlier, it is presumed that juries will follow a district court's limiting instructions. *United States v. Escalante*, 637 F.2d at 1202.

H. INSTEAD OF BEING EXCLUDED, THE EVIDENCE SHOULD HAVE BEEN TESTED BY VIGOROUS CROSS-EXAMINATION

Because the accuracy and reliability of Sage's measurements was never at issue, and because Campion was not asking the jury to decide on whether EMFs *are* dangerous, the evidence need not be tested on the reliability standards set forth in *Daubert v. Merrell Dow Pharmaceutical, Inc.*, 509 U.S. 579. That — combined with the fact that the evidence was plainly relevant — meant that the district court should not have stood in the way as gatekeeper.

In *Daubert*, this Court made special note of the capabilities and role of the jury and of the adversary system. *Daubert v. Merrell Dow Pharmaceutical, Inc.*, 509 U.S. at 595-599. "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Id.* at 596. Here, if the Government felt that there were flaws in Campion's evidence, it should have sought to expose these through cross-examination, with the jury having the last word. It was for the jury, not the district court, to weigh the evidence. What happened here was that the district court improperly exercised a gatekeeping function when none was called for and thereby undermined the adversarial system and invaded the province of the jury.

Moreover, case law shows a particular reluctance to allow district court judges to take expert testimony

away from the jury in condemnation cases. As the Fifth Circuit has pointed out:

> "[I]n determining the admissibility of expert testimony, the district court should approach its task with proper deference to the jury's role as the arbiter of disputes between conflicting opinions. As a general rule, questions relating to the bases and sources of an expert's opinion affect the weight to be assigned that opinion rather than its admissibility and should be left for the jury's consideration. *This is especially true in an eminent domain action*, in which expert opinion testimony acquires special significance . . . where the sole issue is the value of condemned property."

United States v. 14.38 Acres of Land, Leflore County, 80 F.3d 1074, 1077 (5th Cir. 1996) (internal citations and quotations omitted, emphasis added).

CONCLUSION

Whether or not Campion is correct in his arguments on the merits, his case deserves this Court's attention. The law is at best uncertain — yet the issue will come up time and time again as the Government takes land for extra-high-voltage power transmission lines and, each time, important public policy issues will be implicated. All landowners should be treated equally when this occurs. Thus, for all of the reasons stated above, the Court is urged to grant this petition.

Respectfully submitted,

JOHN DERRICK
Counsel of Record
THE LAW OFFICE OF JOHN DERRICK
21 East Pedregosa Street
Santa Barbara, CA 93101
(805) 284 1660

Counsel for Petitioner

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED JUNE 24, 2008

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 06-15410

D.C. No.
CV-03-06064-AWI/LJO

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

87.98 ACRES OF LAND MORE OR LESS IN THE COUNTY OF MERCED; CALIFORNIA DEPARTMENT OF FISH & GAME; KAREN ADAMS,

Defendants,

and

DONN RAYMOND CAMPION,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of California
Anthony W. Ishii, District Judge, Presiding.

Appendix A

Argued and Submitted
February 14, 2008—San Francisco, California

Filed June 24, 2008

Before: William C. Canby, Jr. and Milan D. Smith, Jr., Circuit Judges, And Stephen G. Larson,* District Judge.

Opinion by Judge Canby

OPINION

CANBY, Circuit Judge:

In this case, we review a district judge's discretion to exclude expert testimony regarding electromagnetic fields ("EMFs") in a condemnation action. The United States condemned an easement on land belonging to Donn Campion for the construction of power transmission lines. At trial, both sides offered expert testimony regarding diminution of value of the remaining land resulting from the power lines within the easement. While some of this testimony was allowed, the judge refused to let Campion's expert, an environmental planner, testify about specific EMF levels on the land and the types of questions developers typically ask her about EMFs. A jury found that

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* The Honorable Stephen G. Larson, United States District Judge for the Central District of California, sitting by designation.

Campion was entitled to just compensation in the amount of $2,023,715. The district court entered judgment, and Campion appeals the exclusion of expert testimony. We affirm.

FACTUAL BACKGROUND

Campion owns 3,220 acres of land in Merced County, California. Acting on behalf of the Department of Energy and the Western Area Power Administration, the United States filed an eminent domain action to acquire a right of way easement across the land for a 500kV power transmission line called the Path 15 line. The Path 15 line was constructed and is now operational. It rests on a 200-foot-wide easement running for approximately three miles across Campion's land and covering 87.98 acres. The line is supported by 13 steel towers ranging in height from 130 to 190 feet, and branching out 40 feet on two sides.

Like other live power lines and electrical devices, the Path 15 line generates EMFs that radiate out from the line. There was testimony that the Path 15 line sometimes emits crackling and buzzing sounds. While there is no scientific evidence that EMFs from power lines like the Path 15 line cause adverse health effects in nearby residents, there is a generally acknowledged public perception that EMFs cause health problems.

At the time that the easement was taken, Campion's land was undeveloped and used for agricultural purposes. The land had been zoned for agricultural use,

with a minimum parcel size of 160 acres. The government's expert appraiser, Correia, testified that, at the time of the taking, the highest and best use of the property was for agricultural purposes. On that basis, he valued Campion's entire property at $3.075 million. He further testified that the taking caused no diminution of the value of the land outside the easement. Accordingly, he testified that the government should pay $76,518 as just compensation for the taking of the easement, and only the easement.

Before the taking occurred, however, Campion had begun creating plans to develop part of the land for residential use, a golf course, a community village center, and public facilities. His expert appraiser, Gimmy, testified that the highest and best use of the land at the time of the taking was for such a residential development. On this assumption, Gimmy put the pre-taking value of the land at $19.320 million. Gimmy also concluded that the power transmission lines diminished the value of the land outside of the easement. Barred from testifying that the mere existence of EMFs on Campion's land reduced the land's value, Gimmy cited public perceptions of power lines, environmental issues limiting development in other areas of the property, aesthetic issues, and the practicalities of developing around power lines. He concluded that, after the taking, the property would have no residential potential. Rather, cattle grazing would be the highest and best use of the entire property after the taking. He concluded that the value of the property after the taking was $3.22 million, warranting a $16.1 million compensation award.

Of this amount, only $1.415 million was attributable to the easement itself as opposed to severance damages.

Gimmy's opinion was influenced by the report of another of Campion's experts, Cindy Sage, an environmental planner with extensive experience advising developers regarding the impact of EMFs from power transmission lines on the use and development of property. Sage proposed to testify to the following: (1) public perceptions of the effects of EMFs among residential homeowners and home buyers, (2) the extent and level of EMFs from the Path 15 line that reach beyond the easement into the rest of Campion's property, and (3) the types of studies concerning EMFs for which developers routinely engage her. Of these subjects, the trial judge permitted Sage to testify only to public perceptions. In this appeal, Campion challenges the exclusion of the latter two subjects.

DISCUSSION

Because Sage was not an expert appraiser and there had been no showing that her EMF measurements were reliable, the district judge excluded her testimony except to the extent that Gimmy relied upon it in reaching his conclusion. The district court also ruled-and Campion does not dispute on appeal-that there could be no evidence at trial that EMFs cause actual health problems in nearby residents.[1] On this basis, Gimmy was

1. This ruling accords with widespread authority holding that such evidence is not scientifically reliable. *See, e.g.,* (Cont'd)

barred from testifying that the mere existence of EMFs on Campion's land reduced the land's value. Therefore, Sage was allowed to testify only regarding public perceptions of EMFs.

The judge excluded Sage's testimony regarding EMF levels as prejudicial, reasoning that testimony about specific EMF levels on Campion's land (including a map that outlined a "zone of impairment") might tend to prejudice a jury inclined to believe that EMFs do, in fact, cause health problems in nearby residents. The judge excluded Sage's testimony regarding the EMF studies she would perform for developers for similar reasons. Because the trial judge acted within his discretion in excluding the evidence, we affirm.

I. Standard of Review

A trial court's decision to exclude expert testimony as irrelevant, *see* Fed.R.Evid. 402, or unfairly prejudicial, *see* Fed.R.Evid. 403, in a Fifth Amendment action for just compensation is reviewed for abuse of discretion. *See United States v. 33.5 Acres of Land*, 789 F.2d 1396, 1400 (9th Cir.1986); *United States v. Ravel*, 930 F.2d 721, 726 (9th Cir.1991). When it is not clear whether relevance or unfair prejudice formed the basis for the district judge's ruling, if the proffered testimony

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(Cont'd)

San Diego Gas & Elec. Co. v. Daley, 205 Cal.App.3d 1334, 253 Cal.Rptr. 144, 150-53 (Cal.Ct.App.1988), *disapproved of on other grounds by L.A. County M.T.A. v. Cont'l Dev. Corp.*, 16 Cal.4th 694, 66 Cal.Rptr.2d 630, 941 P.2d 809 (Cal.1997).

could be excluded under either rule, we must affirm. *United States v. Morales*, 108 F.3d 1031, 1035 (9th Cir.1997).

II. Severance Damages in Power Line Condemnation Proceedings

When the government condemns part of a parcel from an owner, it is liable not only for the part taken but also for the diminution of value in the remainder resulting from the severance. *See United States v. 4.0 Acres of Land*, 175 F.3d 1133, 1139 (9th Cir.1999). The excluded evidence bears on the effect of the power lines on market value outside of the boundaries of the easement. Campion, as the landowner in this case, bears the burden of proving his entitlement to these "severance damages." *United States ex rel. Tenn. Valley Auth. v. Powelson*, 319 U.S. 266, 273, 63 S.Ct. 1047, 87 L.Ed. 1390 (1943). As the proponent of Sage's expert testimony, Campion also has the burden to establish its admissibility. *Lust v. Merrell Dow Pharm., Inc.*, 89 F.3d 594, 598 (9th Cir.1996).

Wholly apart from evidence of actual health risks, evidence of public perceptions of health risks-even irrational public perceptions-may properly establish an impact on market value. "[I]f fear of a hazard would affect the price a knowledgeable and prudent buyer would pay to a similarly well-informed seller, diminution in value caused by the fear may be recoverable as part of just compensation." *United States v. 760.807 Acres of Land*, 731 F.2d 1443, 1447 (9th Cir.1984) (citations

omitted). A party may therefore introduce evidence to show how public fears of EMFs, even if they are unreasonable, adversely affect value. *See id.; San Diego Gas & Elec. Co.*, 253 Cal.Rptr. at 150-53 (gathering cases). Thus, the admissibility of Campion's EMF evidence hinges on this latter factor-the extent to which EMFs bear on public perceptions in the marketplace.

III. Evidence of EMF Levels and Locations

In the district court, Campion's offer of proof showed that Sage was willing to give expert testimony regarding the levels and locations of EMFs resulting from the construction and operation of the power line. Specifically, Sage proposed to testify that certain levels of EMFs extended beyond the physical boundaries of the easement into the remainder of Campion's land. Both parties seem to agree that the Path 15 lines would generate EMFs on Campion's land beyond the area of the easement, and two witnesses testified to that effect.[2] Campion challenges only the exclusion of more detailed information about the specific levels of EMFs on the land.

Federal Rule of Evidence 702 provides that a court may admit testimony from a qualified expert if it will

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2. Witness Boyko testified without objection that the EMFs extended beyond the right of way. Gimmy also mentioned how EMFs extended beyond the right of way, subject to a limiting instruction that his testimony should be considered only insofar as it bears on the question of public perception and how public perception affects land value.

help the trier of fact understand the evidence or determine a fact in issue. Such evidence must still be relevant; "[e]xpert testimony which does not relate to any issue in the case is not relevant and, ergo, non-helpful." *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 591, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993) (internal quotation marks and citation omitted). Such testimony must be shown to be either scientifically reliable, *id.* at 592-95, 113 S.Ct. 2786, or otherwise reasonably reliable. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 158, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999). Campion contends that there is no dispute as to the reliability of Sage's measurements, despite comments by the district judge suggesting that the evidence could not be admitted as freestanding expert testimony because there had been no reliability showing under *Daubert* or *Kumho Tire*. Even if Sage's testimony was not demonstrated to be reliable, it might still be admissible under Federal Rule of Evidence 703, which provides that otherwise inadmissible evidence may yet be admissible as the basis for an expert's opinion if its "probative value in assisting the jury to evaluate the expert's opinion substantially outweighs [its] prejudicial effect." If the evidence is admissible of its own accord-and not merely as background for other expert testimony-then it is subject to the standard prejudice test of Rule 403, excludable only if its probative value is substantially outweighed by its unfairly prejudicial effect. We need not decide whether Rule 403 or Rule 703 governs in this case because we conclude that exclusion of the evidence was not an abuse of discretion under either rule.

Appendix A

A. Probative Value

Circuit precedent provides meaningful guidance on the probative value of the measurements in question. In *760.807 Acres*, the government condemned a safety buffer zone for loading explosives on a shore. 731 F.2d at 1445. The landowner introduced expert testimony suggesting that severance damages were appropriate because the buffer zone did not provide adequate protection for the rest of his land. *Id.* at 1448-49. In reaching his conclusion, this expert relied upon the opinion of another expert as to what was actually "safe." *Id.*

This evidence was admitted but the jury rejected it and found no severance damages. When the landowner challenged the verdict on appeal, the court held that the landowner failed even to make out a prima facie case for severance damages because there was no testimony connecting the safety issue to the real estate market. *Id.* Rather than relying on an expert's perception of a safety risk, the landowner should have introduced evidence showing public perceptions of a safety risk. *Id.* Scientific evaluations of conditions on the property must bear on market effects to be admissible. If the expert based his opinion on nonpublic information and there was no showing of what the public considered a safe buffer zone, the opinion could not support a verdict for the plaintiff. While the ultimate issue in that case was the sufficiency-rather than the exclusion-of evidence, the court's holding did not deal in shades of sufficiency, stating that "[t]here is ... no demonstrated causal link

between the taking of the [buffer zone] and the severance damage of which the Trustees complain." *Id.* at 1449.

We conclude that this example governs our case. The trial judge here required all EMF evidence to bear on public perceptions and their market effect. This requirement was no surprise to Campion: it was reiterated in a series of hearings before and during trial that if Campion wished to introduce evidence of EMF levels, he would have to show the connection between those levels and public perceptions. Campion declined the court's repeated invitation, even when given an extended opportunity to make an offer of proof.

Campion argues that he was deprived of a chance to show the jury the premise of his claim-the fact that EMFs do exist on the property. While public perceptions of danger from power lines are, to some extent, predicated on the *existence* of EMFs in a given area, Gimmy's testimony in the record and his report do not suggest that EMF *measurements* are relevant to public perceptions. The jury heard testimony from two witnesses that EMFs existed. In the absence of relevant and probative evidence, a jury could only speculate concerning the effect of a particular measurement on public perception. Perhaps the general public, unschooled in the significance of the milligauss,[3] is afraid

3. One thousandth of a gauss; the unit Sage employed in her measurements. The *Oxford English Dictionary* defines "gauss" as follows: "The electromagnetic unit of magnetic (Cont'd)

of actual EMFs in any quantity, so long as they come from a big power line. Or perhaps the levels of EMFs that exist on Campion's land would even *ease* public fears in the marketplace. *See id.* There is simply no way for a jury to tell. Without any evidence from Gimmy or anyone else that higher levels of EMF generate higher levels of buyer aversion and lower sale prices, Sage's testimony about specific EMF levels has little to no probative value.

B. Prejudice

Our inquiry next turns to the unfair prejudice that could have resulted had Sage's measurements been introduced. To the extent that Sage's testimony and illustration suggested that certain levels of EMFs would burden or undermine the value of his property, Campion failed to show how the EMF levels in that witness-selected zone had a special influence on public perceptions. There is a corresponding risk that Sage's testimony would mislead or confuse the jury; the testimony would invite inferences about EMF levels that were unsupported—whether they ran to Campion's advantage or not.[4] Given the potentially prejudicial

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(Cont'd)
induction (flux density) in the [centimetre-gram-second] system, defined as the induction that exerts a force of one dyne on each centimetre of a straight wire carrying one e.m.u. (10 amp.) of current, when the induction is perpendicular to the wire."

4. At the hearing on October 28, 2005, the district judge described part of the prejudice concern in a way that accords (Cont'd)

effect of the measurements and Campion's failure to establish their probative value, we hold that their exclusion was not an abuse of discretion.[5]

IV. Studies Commissioned by Developers to Measure EMFs

The court prohibited Sage from describing the EMF studies that developers had commissioned her to undertake or specific instances where she had advised developers about EMFs. The judge reasoned that "when people hear about number crunching, computer models, . . . et cetera, in order for that to have some relevance, the underlying premise, that is, that EMF

(Cont'd)
with his ultimate ruling: [T]he maps [showing EMF levels on Campion's land] are obviously a concern because I can envision a map where she has these red lines or something like that, which, again, as I've indicated, just really overemphasizes, with no factual basis, that there is this zone-not a zone of fear, but a zone of EMF transmissions, which implicitly cause harm. And that's not what . . . this jury needs to be concerned about.

5. In evaluating the trial judge's exercise of discretion, we note that the government received parallel treatment with respect to mitigating evidence it offered about EMFs that come from all kinds of electrical devices. The government offered this evidence for purposes of impeachment of Gimmy, and the court ruled that it was unfairly prejudicial under Rule 403 because there had been no showing that home buyers generally take their default EMF exposure from all kinds of electrical devices into account when evaluating the risk of living near power lines.

causes some danger or harm, would be required." While this evidence is closely associated with the excluded measurements, separate analysis applies because it does not relate to the market's sensitivity to the result of Sage's measurements, but to the market's sensitivity to the *fact* that some buyers seek out Sage's measurements in the first place. Because this evidence held little probative value and any erroneous exclusion of this evidence was harmless to the verdict, we affirm the district court.

A. Probative Value

Testimony by Sage regarding her experience with developers would have some probative value to the extent that it reflects the perceptions of developers in general concerning EMFs. When developers exhibit their anxiety by requesting computer models, those requests may illustrate a form of public perception. That perception exists regardless of whether the results of Sage's tests are reliable. Without inferring any causal link between specific measurements and market behaviors, it is possible to infer that developers are concerned because they commission these reports. The judge's objection—that computer modeling implies actual danger and scientific accuracy—poses no obstacle to probative value. Sage's computer models and studies are direct evidence that those public misapprehensions about EMF risk exist, at least in the view of developers.

The probative value of the testimony would have added relatively little, however, to the evidence that *was*

presented at trial. *See* Fed.R.Evid. 403 (balancing probative value against "needless presentation of cumulative evidence"). The judge did allow Sage to testify, by way of personal background, to the fact that she advises developers about EMFs generally. This testimony included showing the jury a list of Sage's clients. The district judge forbade her to testify only regarding specific instances where she advised developers and other entities. The judge reasoned that Gimmy did not base his expert testimony on Sage's advice to specific developers. The judge also noted that the impact of Sage's advice on public perceptions was unclear without surveys or some other broad indicia of market effects. In light of the fact that the judge did allow Sage to testify that she advised developers generally, the marginal probative value of specific instances of advice is minimized, particularly when there was no tie-in to Gimmy's testimony.

B. Unfair Prejudice and Harmless Error

The danger of confusion or prejudice from this testimony is not as apparent as the danger relating to EMF measurements and impairment zone maps, but it probably exists in some degree because the jury might give it undue effect. The balancing of factors for and against admissibility is close enough so that we cannot say that the district court abused its discretion in excluding this part of Sage's testimony. Even if we were to conclude to the contrary, however, reversal would not be required. A non-constitutional error requires reversal unless there is a "fair assurance of

harmlessness, or stated otherwise, unless it is more probable than not that the error did not materially affect the verdict." *See United States v. Seschillie,* 310 F.3d 1208, 1214 (9th Cir.2002) (internal quotation marks and citation omitted). The perceptions of the developers with whom Sage came into contact were only one segment of the total evidence of public perceptions, and they were even a smaller segment of the overall evidence of diminished value, which included visual, auditory, and other factors. In light of the evidence's limited probative value, and the fact that the jury could infer that developers inquire about EMF levels from other aspects of Sage's testimony, it is more probable than not that the exclusion of testimony on Sage's specific experiences with developers did not materially affect the verdict.

CONCLUSION

The trial judge acted within his discretion in excluding Sage's measurements, as depicted in a map of the "impaired zone," on the ground that they could plausibly mislead the jury into thinking that EMFs posed a proven health risk to humans. The countervailing probative value of such measurements is minimal because Campion presented no evidence linking specific EMF levels with specific public perceptions or market effects. With respect to the models Sage constructed for developers, these specific examples offer little probative value in light of the

general testimony regarding Sage's work that was admitted. If there was any error in excluding the latter evidence, the error was harmless. The judgment of the district court is

AFFIRMED.

APPENDIX B — AMENDED FINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA DATED JANUARY 4, 2006

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

1:03-cv-6064 AWI/LJO

UNITED STATES OF AMERICA,

Plaintiff,

v.

87.98 ACRES OF LAND MORE OR LESS IN THE COUNTY OF MERCED; DONN RAYMOND CAMPION; et al.

Defendant.

AMENDED FINAL JUDGMENT

This case is before the court for entry of Final Judgment based on the jury verdict returned November 23, 2005, determining the sum of $2,023,715.00 to be just compensation for the taking of the captioned property from defendant Donn Raymond Campion ("defendant Campion").

Appendix B

THE COURT FINDS AS FOLLOWS:

1. The estate acquired in this action is an easement interest comprising approximately 87.98 acres of land located within 3,200.52 acres of land owned in fee simple by defendant Campion (the "subject property"). The easement interest condemned in the subject property are more particularly set forth in the Complaint and Declaration of Taking filed on August 7, 2003. Said interests are adopted herein by reference.

2. On August 7, 2003, plaintiff United States of America, Department of Energy, Western Area Power Administration ("the United States") deposited the sum of Thirty Nine Thousand Four Hundred Thirty and No/100 Dollars ($39,430.00) with the Court as estimated just compensation for the taking of the interests condemned in the subject land, as more particularly defined in said Complaint and Declaration of Taking.

3. The use for which the subject property is taken and condemned by the United States is one authorized by law and is a public use, as described in the Declaration of Taking. The property and its taking are necessary and suited to that use.

4. All parties interested directly or indirectly in the subject property have been served with process or by publication, or have appeared in this action. The property, and all claimants and parties interested therein, are within the jurisdiction of this Court, which has the power and authority to enter this final judgment.

5. At the time of and immediately preceding the filing of the Complaint and Declaration of Taking, defendant Campion was identified as the sole owner in fee simple of the property taken in this matter and therefore further identified as the sole defendant entitled to the compensation to be awarded for the taking of the estate and interests condemned by this action.

6. On August 7, 2003, title to the subject property vested in the United States of America upon the filing of the aforementioned Declaration of Taking and the deposit of $39,430.00 as estimated just compensation into the Registry of the Court. Simultaneously, the right to just compensation for the estate taken vested in the person entitled thereto, that being defendant Campion.

7. Pursuant to the Court's Order dated on or about July 13, 2005, the Clerk of the Court distributed the $39,430.00 to defendant Campion.

8. On December 27, 2005, the United States deposited an additional $1,984,285.00 deposit to the Clerk of the Court for the purpose of ultimately being withdrawn by defendant Campion. This amount comprises the difference between the jury verdict of $2,023,715.00 in just compensation and the initial deposit of $39,430.00 withdrawn by defendant Campion prior to trial. This amount also comprises the deficiency between the initial amount deposited as just compensation and the amount of the jury verdict.

9. The sum of $2,023,715 as found by the jury is just compensation for the taking of defendant Campion's property, exclusive of statutory interest, and this sum constitutes full satisfaction of any and all claims of whatsoever nature against the United States by reason of the institution and prosecution of this action and the taking of the subject property.

10. The said just compensation shall be subject to any and all liens, encumbrances, and charges of whatsoever nature, existing against the land when title thereto vested in the United States, and any such liens, encumbrances, and charges of whatsoever nature, shall be payable and deductible from said sum.

NOW THEREFORE IT IS ORDERED, ADJUDGED AND DECREED that the sum of $2,023,715.00 is the full, fair and just compensation for the taking of the United States of the subject property, exclusive of interest to be awarded in this case; and

That as of December 27, 2005 the United States has satisfied its obligation to pay into the Registry of the Court the deficiency of $1,984,285.00, exclusive of interest to be awarded in this case; and

That the United States shall further pay into the Registry of the Court pre-judgment interest, pursuant to 40 U.S.C. 3116 and as calculated and stipulated by the parties, the amount of $89,185.00, plus an additional $215.68 per day from November 23, 2005 until date of payment to the Registry of the Court; and

Appendix B

Upon the deposit of said deficiency, together with all accrued interest, into the Registry of the Court, the Clerk of the Court without further order of this Court shall draw a check for the full amount deposited, payable to Norman E. Matteoni, Trustee for Defendant Donn Raymond Campion, Federal Tax ID #94 2597129, and deliver said check to his counsel of record, Matteoni, O'Laughlin & Hechtman at 848 The Alameda, San Jose, California 95126, Attn: Peggy O'Laughlin. It is further Ordered that said attorney shall forthwith apply the proceeds of said check to the payment, discharge and release of any and all remaining taxes, assessments, liens and encumbrances against the property on the date of taking, and to the redemption of all tax sales thereof, if any, and the balance pay over to defendant Campion.

The Court retains jurisdiction with respect to whether defendant Campion is entitled to an award of fees and/or costs under the law.

IT IS SO ORDERED.

Dated: January 4, 2006

/s/ Anthony W. Ishii
UNITED STATES DISTRICT JUDGE

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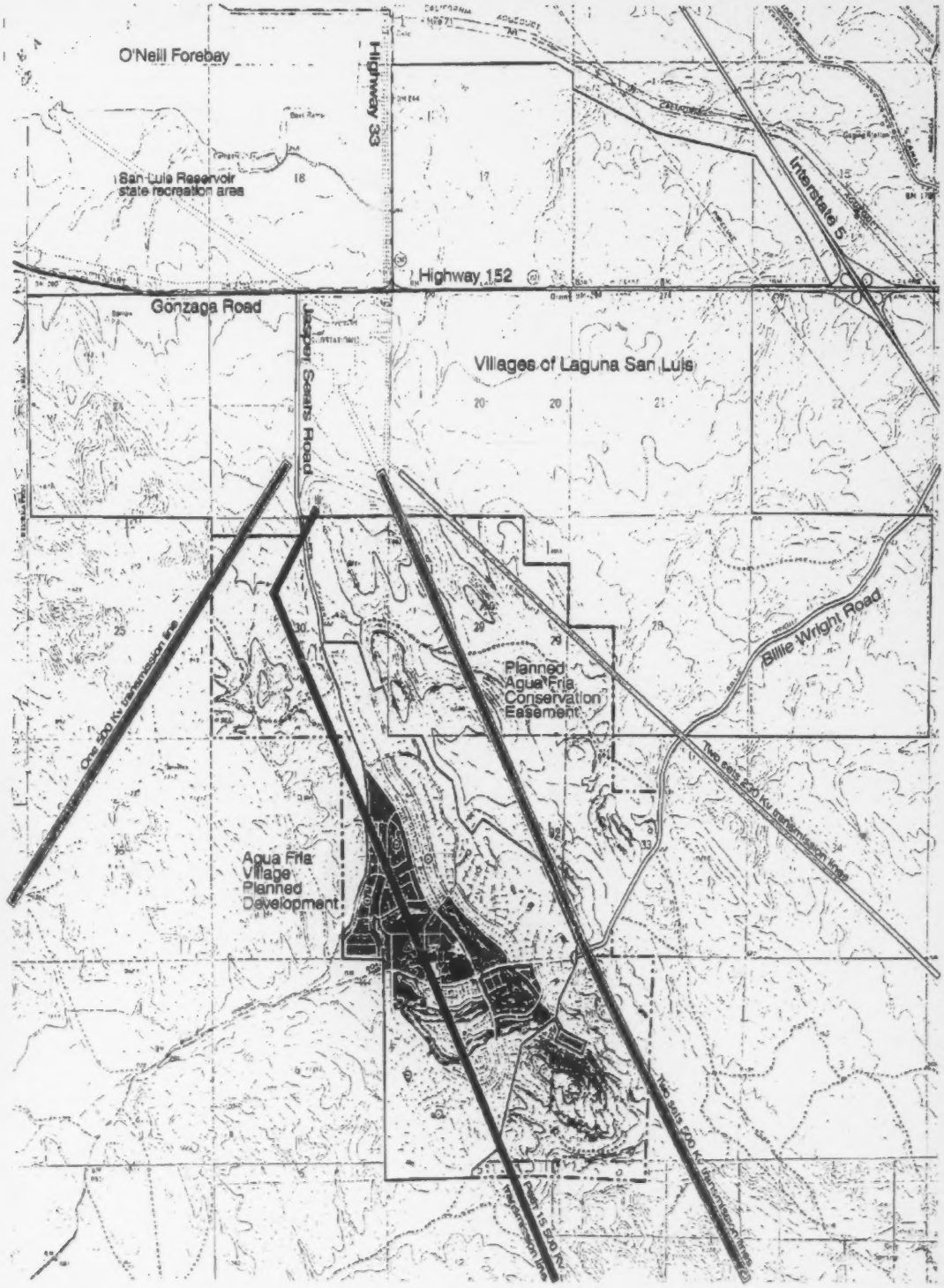
APPENDIX C — TRIAL EXHIBITS
(PHOTOGRAPH AND MAP)

Draft Agua Fria Village SUDP Diagram with Path 15 500,000 volt transmission line

BEST AVAILABLE COPY


O'Neill Forebay
San Luis Reservoir state recreation area
Highway 33
Interstate 5
Highway 152
Gonzaga Road
Jasper Sears Road
Villages of Laguna San Luis
Billie Wright Road
Planned Agua Fria Conservation Easement
Agua Fria Village Planned Development
One 500 Kv transmission line
Two sets 500 Kv transmission lines
Two sets 500 Kv transmission lines
Two sets 500 Kv transmission lines

Legend: Land Uses

north

0 500 1000 2000 feet 1 mile

Path 15 500 kV line

prior 500 kV line

prior 230 kV line